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Consumers in the Energy Transition

The Right to Participation for Consumers in the Energy Transition

Saskia Lavrijssen*

The energy system of the future is smart and sustainable, with IT applications making it possible to efficiently match supply of and demand for sustainable energy. It will turn consumers into active players, responding to financial incentives to either or not use energy at specific moments, or supply self-generated energy to the system. The system will be organized in such a way that everybody will charge their cars when the sun is shining, for instance, or will postpone their use of energy when there is not enough sunshine or wind. This article points out that new legislation is needed to ensure that innovations for energy transition can take place and for market parties and consumers to take on new roles. This paper argues that not only the substance of energy legislation needs to be adapted to facilitate the energy transition. Also procedures for the implementation of important energy decisions and the required level of legal protection will have to be adjusted to the new systems and to the active role of consumers. Procedural innovations are needed to improve the position of energy consumers, giving them more of a say, increasing their participation, and offering them legal protection in regard to decisions on energy regulations by the Autoriteit Consument en Markt (ACM – Consumer and Market Authority) that affect their interests where affordable, reliable and sustainable energy supply is concerned. It is important that consumers be given better opportunities to exert influence in advance on the conditions and rates for access to the energy system. By creating support for the content of energy decisions, time-consuming and expensive legal procedures afterwards can be prevented.

I. Introduction

The European Union and its member states, including the Netherlands, face major challenges in reducing CO₂ emissions and combating the threat of climate change. Within the EU, the European Council in 2014 reached consensus on the targets of reducing greenhouse gas emissions by at least 40 per cent by 2030 (compared to 1990 levels) and by 80–95 per cent by 2050 (compared to 1990 levels). In addition, the

Council agreed to target at least a 27 per cent share of sustainably generated energy within the EU, and to improve energy efficiency by at least 27 per cent by 2030.¹ Within the Netherlands, in the context of a national energy policy for sustainable growth, government joined hands with business and industry, trade unions, and civil society organizations in an effort to increase the share of renewable energy in the Netherlands to 23 per cent of total energy use by 2023, and to reduce energy consumption by an average of 1.5 per cent annually.² The Dutch government's 2015 Report on Energy, titled "Transition to Renewables", restates the aim of achieving an 80–95 per cent reduction of greenhouse gas emissions at the European level by 2050 and of linking up with relevant European commitments, such as the emissions trading scheme.³

Fossil fuels are the largest producer of CO₂ emissions. At present, 95 per cent of the Netherlands' energy supply is still dependent on such fuels. If the European and national objectives cited above are to be achieved, a fundamental reform of the energy system will be required and a transition to a sustainable energy supply. According to the Dutch Council for the Environment and Infrastructure (CEI), fully sustainable energy production can be defined as low-carbon energy production, which is reliable in supply, safe, and affordable.⁴ Beyond the government of the Netherlands, the energy companies, and the system operators, a major role in the transition to a

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¹ European Council Conclusions, EUCO 169/14, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Policy Framework for Climate and Energy in the Period from 2020 to 2030, COM/2014/015 final. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Energy Roadmap 2050, COM(2011) 885 final. The European climate targets for 2020 were set previously by the Council of the European Union in the Presidency Conclusions, 7224/1/07 REV 1.

² SER, Agreement on Energy for Sustainable Growth, 2013, <http://www.energieakkoordser.nl/doen/engels.aspx>, accessed 1 September 2016.

³ Ministry of Economic Affairs, Transition to Renewables, Energy Report (Transitie naar Duurzaam, Energierapport), 2016, 5–6.

⁴ Raad voor de Leefomgeving (RLI), *Naar een Duurzame Energievoorziening in 2050* [Counsel for the Environment, *A State without CO₂: Towards a Sustainable Energy Supply in 2050*], 2015, p. 11, www.rli.nl; accessed 1 September 2016.

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sustainable energy supply is also being played by commercial and household energy users (hereafter also called energy customers or consumers). As will be discussed below, by using energy more efficiently, and by generating energy themselves, as so-called “prosumers”, they too can make a significant contribution to the transition to a sustainable energy supply.⁵

Multiple scenarios have been explored for how a sustainable future energy supply might be designed.⁶ Nonetheless a number of the same elements are found in most of the various scenario studies, among them, the following:⁷

1. A transition from energy generated from fossil fuels to energy generated from renewable sources, such as wind energy and solar energy;⁸
2. A transition from large-scale production of energy to multiple small-scale local generators of renewable energy;
3. Energy consumers increasingly become “prosumers”; they not only withdraw energy from the transmission network, but also produce energy themselves and supply it into the network;
4. There are more intermittent energy sources, with greater fluctuations in supply;
5. The energy transmission system becomes “smart”, meaning that IT applications are utilized for optimal alignment of supply and demand;⁹
6. Due to the introduction of demand-side management¹⁰ and storage facilities for energy (e.g., in batteries), the system becomes more flexible and more supply-driven than demand-driven;¹¹
7. The European Union contributes to establishment of an Energy Union, and member states work together to ensure a reliable, affordable and sustainable energy supply. The European Commission and European agency are given a growing role in integration of the energy market, among other things, by regulating cross-border transmission networks and by setting up cross-border balancing and flexibility markets.¹²

The hypothesis of the current contribution is that for the transition to a sustainable energy supply a fundamental reappraisal will be required of existing European and Dutch laws, regulations, and decision-making procedures.¹³ The legislative framework and legal safeguards currently in place are still based on the traditional market model, in which centrally-managed,

(Ed.), *De Consument en de andere kant van de elektriciteitsmarkt* [*The Consumer and the other side of the Electricity Market*], Amsterdam: Centre for Energy (Centrum voor Energievraagstukken), University of Amsterdam, 2010, p. 44 etc.

⁶ See “Frontier Economics: Scenarios for the Dutch Electricity Supply System”, September 2015 and ECORYS, *The role of DSOs in a Smart Grid Environment*, DG ENER, Amsterdam/Rotterdam, 23 April 2014.

⁷ See on this M. Boersma, *Nutsbedrijven: Quo Vadis? [Utility companies: Quo Vadis?]*, inaugural address at Tilburg University, 2015. See also Report of a round table consultation on energy supply, “Nieuwe spelregels voor een duurzaam en stabiel energiesysteem” [“New rules of the game for a sustainable and stable energy system”], September 2015. See also RLI, 2015, p. 21.

⁸ According to Article 2 of directive 2009/28/EG of the European Parliament and the Council of 23 April 2009 to promote the use of energy from renewable sources and amending and subsequently appealing Directive 2001/77/EC and Directive 2003/30/EC, OJ L 140/16 2009, energy from “renewable sources” is energy derived from renewable, non-fossil sources, namely, wind, sun, aerothermal, geothermal and hydrothermal energy and energy from the ocean, hydropower, biomass, landfill gas, gas from sewage treatment plants and biogases.

⁹ The definition of the European Commission is adhered to: “A Smart Grid is an electricity network that can cost efficiently integrate the behaviour of all users connected to it – generators, consumers and those that do both – in order to ensure economically efficient, sustainable power system with low losses and high levels of quality and security of supply and safety”, Standardization Mandate to European Standardization Organizations (ESOs) to support European Smart Grid Deployment, Brussels 1 March, 2011, M490. See R. Hoenkamp, *Safeguarding EU Policy Aims and Requirements in Smart Grid Standardization* (diss. University of Amsterdam), “s-Hertogenbosch: Uitgeverij BOXPress 2015, p. 4.

¹⁰ Demand-side management or demand response encompasses all deliberate changes in the consumption patterns of end-users of electricity geared to changing the time point of energy use, the level of current energy use or total energy use. See also CEER, *Advice on the take-off of a demand response electricity market with smart meters*, ref: C11-RMF-3603, December 2011. Eurelectric, *Views on Demand Side Participation*, 2011, pp. 9–10; http://www.eurelectric.org/media/61240/dsp_report_0810-02_simple_page_final-2011-030-0638-01-e.pdf; accessed 1 September 2016.

¹¹ The term flexibility refers to the capacity of market participants to respond as quickly as necessary to fluctuations in supply and/or demand, TNO, *Naar een toekomstbestendig energiesysteem: flexibiliteit met waarde* [Towards a future ready energy system: The value of flexibility], July 2015, p. 7.

¹² Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, the Committee of the Regions and the European Investment Bank: A Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy, COM/2015/080 final.

¹³ See also Report of a roundtable consultation on energy supply, *Nieuwe spelregels voor een duurzaam en stabiel energiesysteem* [New rules of the game for a sustainable and stable energy system], September 2015.

⁵ On this, see S.A.C.M. Lavrijssen, “The Different Faces of the Energy Consumers: Towards a Behavioral Economics Approach”, *Journal of Competition Law and Economics*, 2014, volume 10, nr. 2, pp. 257–29. In the third energy directive, the term “consumer” encompassed various groups of customers: wholesale customers, household customers, non-household customers, vulnerable customers). See S. Pront-van Bommel, “De energieconsument centraal?” [“The Energy Consumer Central?”] In: S. Pront van-Bommel

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large-scale production units supply energy to meet the demand from users. From this perspective, users are viewed as passive agents rather than as active players and/or “prosumers”. Thus, in the traditional model users play a very limited role in the development and realization of energy-related projects.¹⁴ New legislation is needed to ensure that technological and social innovations get under way in order to bring about the energy transition. This new legislation will have to provide scope for changing roles of market participants, such as distribution system operators and consumers as producers. Not only must the substance of legislation be re-evaluated and modernized, procedures for reaching important decisions that affect energy consumers and the level of legal protection they require also have to be reassessed in light of new developments.¹⁵ In this respect, it’s worth noting that much of the scientific and public debate has been focused on technological innovations related to “smart” energy systems. Unfortunately, often these debates lose sight of the fact that the (new) legislation and regulation required must comply with fundamental constitutional principles and human rights, such as the right to privacy, the right to participation and the right to effective legal protection for energy users.¹⁶

In view of developments up to now, the current contribution centres on the following question: Are the required legal safeguards in place to provide adequate protection for energy consumers/prosumers in the transition to a sustainable energy supply? How could legal protection for energy consumers/prosumers be improved? For example, what options are open to a prosumer who wants to seek more favourable conditions for supplying electricity generated using solar panels to the energy system? The focus of this contribution is primarily on legal protection in the face of decisions made by the Authority for Consumers and Markets (ACM), which is the independent regulatory authority that plays a key role in the regulation of transmission and distribution system operators in the Netherlands. In a sustainable energy system, system operators also play a crucial role in ensuring the transport of energy and safeguarding the sustainability, affordability, and reliability of the energy supply. It is therefore important that energy consumers/prosumers have sufficient options for defending their rights and interests associated with the sustainability, affordability, and reliability of energy supply via administrative proceedings and court rulings. The definition employed here of the concept of legal protection is broad. It refers to opportunities for energy consumers/prosumers to seek protection of their rights and interests in retrospect in a court of law (ex post legal protection), but also to opportunities for consumers to speak out beforehand (ex ante legal protection) in administrative procedures concerning rules and decisions that influence their legal position. Earlier contributions have focussed on ex post legal protection by analysing the right of

consumers/prosumers to defend their rights and interests before the courts. This contribution will mainly focus on ex ante legal protection by discussing the right of consumers to participate in proceedings leading to energy regulatory decisions that affect their rights and interests.¹⁷

The legal position of the consumer/prosumer in administrative proceedings will be investigated through legal analysis of the relevant European and national legislation and regulations and the jurisprudence of the European Court of Justice and the Netherlands’ Trade and Industry Appeals Tribunal (TIAT). Drawing on specific and representative examples, the article will illustrate how the applicable proceedings have influenced the economic and legal position of the energy user in practice and where gaps in ex ante legal protection remain. For that purpose, section 2 begins with a discussion of the basic principles involved, main objectives of legislation, the market model, and the key institutions associated with current energy legislation, both in Europe and nationally, within the Netherlands. Section 3 examines

¹⁴ S.A.C.M.Lavrijssen, *De verschillende gezichten van de energieconsument, naar een gedragseconomische benadering van de energiesector* [The different faces of energy consumers: Towards a behavioural-economics approach to the energy sector] (inaugural address, University of Amsterdam), Oisterwijk: Wolf Legal Publishers 2012. See further on this topic A. Huygen in: “De Consument en de (on)vrije elektriciteitsmarkt” [“The consumer and the (un)free electricity market”], S. Pront van-Bommel (Ed.), *De Consument en de andere kant van de elektriciteitsmarkt* [The Consumer and the other side of the Electricity Market], Amsterdam: Centre for Energy (Centrum voor Energievraagstukken), University of Amsterdam, 2010, p. 96–132.

¹⁵ A. Huygen, “Beleid voor innovaties in de energiesector” [“Policy for innovation in the energy sector”], *TPedigitaal* 2015, volume 2, nr. 9, pp. 62–78.

¹⁶ C. M. K. C. Kuijpers & E. J. Koops, “Smart metering and privacy in Europe: Lessons from the Dutch case”, in: S. Gutwirth, R. E. Leenes, P. de Hert, & Y. Poullet (Ed.), *European Data Protection: Coming of Age*, Springer 2013, pp. 269–293, S. Lavrijssen, “More intensive judicial review in competition law and economic regulation in the Netherlands”, in O. Essens, A. Gerbrandy & S.A.C.M.Lavrijssen (Ed.), *National Courts and the Standard of Review in Competition Law and Economic Regulation*, Groningen: Europa Law Publishing 2009, p. 175.

¹⁷ Lavrijssen, S., Eijkens, J. & Rijkers, M., “The Role of the Highest Administrative Court and the Protection of the Interests of the Energy Consumers in the Netherlands” September 1, 2014, TILEC Discussion Paper No. 2014–032, Available at SSRN: <http://ssrn.com/abstract=2491564>, S. Lavrijssen, J. Eijkens & F. Capkurt, “Rechterlijke toetsing van energieregulering door het CBb en het recht op effectieve rechtsbescherming?”, *SEW* 2016, nr. 142–161, p. 144, S.A.C.M. Lavrijssen, “What Role for Administrative Courts in Granting Effective Legal Protection in the Energy Sector?”, *European Energy and Environmental Law Review* 2014, pp. 219–232.

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the changing roles of system operators and energy consumers/prosumers and how their mutual relationships are evolving in the energy transition context. Section 4 analyses how the right to participation is currently provided in the face of decisions made by the ACM in regulating system operators. Section 5 then examines, drawing on examples, areas where the right to participation for energy consumers is currently operative and where gaps in ex ante legal protection exist. Sections 6 and 7 offer suggestions for improving ex ante legal protection in administrative proceedings, taking into account the changing roles of consumers/prosumers as we move towards the energy transition. Finally, the contribution closes with a brief conclusion.

II. Principles Underlying Current Legislation

2.1 Objectives and public interests

Before the liberalization of the energy market in the EU, the national energy markets were dominated by legal national monopolies. Large-scale, vertically integrated energy companies were responsible for the production, supply, and transport of electricity via transmission and distribution systems.¹⁸ Liberalization laws -implementing European directives- were enacted to break open these national markets, in order to promote fair competition between energy companies within the EU, to secure for energy users the right to freely choose their suppliers, and to establish a single European internal energy market. The foremost underlying objective and public interest guiding the current (now third) package of European directives and regulations on energy is safeguarding the affordability, reliability, safety, and sustainability of the energy supply for energy consumers.¹⁹ The hope of the European legislature has been that promotion of competition and freedom of choice among consumers would lead to improved efficiency among energy companies, translating in turn into qualitatively higher standards of service at more affordable energy prices.²⁰ The energy consumer thus is viewed as a driver of competition. Over time, the European energy directives and consequent directives, such as the Renewable Energy Directive²¹ and the Energy Efficiency Directive,²² have set increasingly high demands regarding environmental and climate policy. Thus, inherent in the third package of European energy legislation and the Energy Efficiency Directive is the idea that consumers must be stimulated to be more efficient in their energy use.²³ The European legislature thus assumes not only that the consumer is a driver of competition, but also that the consumer can play an active part in reducing CO₂ emissions and achieving the environmental and climate targets of European energy policy. Research shows, however, that a substantial share of household consumers is by no

means consistent in playing the role of driver of competition and energy-conscious consumer.²⁴ On the other hand, as will be discussed later, increasing numbers of consumers generate their own sustainable energy, for example, with solar panels, and supply that back into the distribution system.²⁵

2.2 Step by step liberalization of the energy market

Legislation liberalizing the European energy market has proceeded in three phases up to now. The gradual opening up of the energy markets of the EU member states began with implementation of the first European energy package. That legislation gave, initially, only commercial users the right to choose their own energy supplier.²⁶ In 2003, the first electricity and gas directives were replaced by a second package of European energy directives and regulations, which further harmonized regulation of the European energy

¹⁸ S.A.C.M.Lavrijssen & L. Hancher, "Nieuwe ontwikkelingen in het toezicht op de energiesector; scherpere regulering voor verdergaande liberalisering" ["New developments in oversight of the energy sector: Stricter regulation for further liberalization"], *Nederlands Tijdschrift voor Europees Recht* 2002, nr. 3, pp. 33–40, L. Hancher & S.A.C.M.Lavrijssen, "Geleidelijk op weg naar een geliberaliseerde elektriciteitsmarkt" ["Moving gradually towards a liberalized electricity market"], *SEW* 2000, nr. 2, pp. 42–55 and L. Hancher & S.A.C.M.Lavrijssen, "De Eerste Gaswet, bestaande structuren in een nieuw jasje" ["The first Gas Act: Existing structures repackaged"], *SEW* 2000, nr. 6, pp. 230–246.

¹⁹ See Communication from the European Commission, A Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy, COM/2015/080 final. See, for a detailed discussion of the concepts of affordability, sustainability and security of supply, S.A.C.M.Lavrijssen & I. Bordei 2012, pp. 1–26.

²⁰ Lavrijssen 2012, p. 8.

²¹ Directive 2009/28/EC of the European Parliament and the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC, OJ L 140/16 2009.

²² Directive 2012/27/EU of the European Parliament and the Council of 25 October 2012 regarding energy efficiency, in amendment of Directives 2009/125/EC and 2010/30/EC and subsequently repealing Directives 2004/8/EC and 2006/32/EC, OJ EC L 315 2012, pp. 1–56.

²³ See, e.g., grounds 6 and 50 of Directive 2009/72/EC. See also grounds 47 of Directive 2009/73/EC.

²⁴ Communication from the Commission, *Delivering a New Deal for Energy Consumers*, COM (2015) 339 final.

²⁵ ECN, Plan Bureau voor de Leefomgeving [Netherlands Environmental Assessment Agency] and CBS, Nationale Energieverkenning 2015 [National Energy Reconnaissance], The Hague, 2015.

²⁶ Directive 96/92/EC of the European Parliament and the Council of 19 December 1996 concerning common rules for the internal market for electricity OJ EC L 27–20 1997; directive 98/30/EC of 22 June 1998 concerning common rules for the internal market for natural gas, OJ EC L 204/1 1998. See C. Jones, *EU Energy Law*, Vol. I, 2010, pp. 2–3.

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market.²⁷ This second package aimed at establishing a competitive market in which all consumers, including households, per July 2007, could choose their own energy supplier.²⁸ However, the second package proved unable to bring about a competitive market and to protect energy consumers' interests. In fact, the legislation was implemented in various ways in the different member states, and it did not go far enough in establishing a level playing field for all energy supply companies.²⁹ Therefore, a third package of European energy directives and regulations was adopted.³⁰ This legislative package contained, among other things, stricter rules regarding "unbundling" of the energy networks of the supply and production companies. Indeed, a physical property of the energy market is that the infrastructure required to transport electricity via transmission and distribution systems is usually a natural monopoly. That is, in both physical and in economic terms, due to the high costs involved, there is scope for only one energy network in a particular area. A crucial component of the liberalization of the market therefore is the (legal and/or economic) unbundling of the energy networks involved in production and supply activities. Unbundling ensures that new market entrants can gain impartial access to energy networks, in order to supply energy to end-users. Independent market authorities are required to oversee fair access to the networks. They are authorized to stipulate what tariffs and conditions system operators may set for providing access to their network. The third legislative package also contained stricter requirements regarding independence of the market oversight authorities, as well as expanded requirements regarding the powers of market oversight authorities and stricter transparency requirements for companies in wholesale markets.³¹ Furthermore, it strengthened and institutionalized the previously rather informal cooperation between the national market authorities by establishing a European agency, namely, the Agency for the Cooperation of Energy Regulators.³²

In the meantime, a fourth phase of energy market liberalization and integration has gotten under way. The European Commission has consulted all member states, interested market participants, and citizens on a new market model and new governance structures for the energy sector, geared towards achievement of the energy transition in the EU. The outcomes of these consultations will very likely lead to proposals for changes in European legislation and regulations.³³ The European Commission considers the current market model out of date. According to the Commission:

"The existing market concept dates from an era in which large-scale, centralized power plants, largely fuelled by fossil fuels, had the key aim of supplying every home and business in a limited area – typically a Member State – with as much electricity as they wanted, and in which consumers – households, business and industry, were perceived as

passive. Today, the move towards decentralized generation increases the number of involved players and changes the existing market roles. ..."³⁴

The energy market and the legislation and regulations governing it must adapt to this new reality. Facilities for sustainable energy supply have to be incorporated, new market players have to be given sufficient room to operate, and energy production and distribution companies have to draw up new contracts with consumers/prosumers who want to generate energy for themselves and supply it flexibly into the network. The next section takes a closer look at how regulation of transmission and distribution system operators is provided for in the current legislation. It also discusses the way in which the energy transition could change the role of the system operators in relation to the consumer/prosumer, sketching the

²⁷ Directive 2003/54/EC of June 2003 concerning common rules for the internal market for electricity and repealing Directive 96/92/EC, OJ EC L 176/37 2003; Directive 2003/55/EC of June 2003 concerning common rules for the internal market for natural gas and repealing Directive 98/30/EG, [2003] OJ EC L 176/57.

²⁸ Jones, *EU Energy law*, Vol. I, 2010, p. 3.

²⁹ S. Pront-van Bommel, "Het derde Energiepakket" ["The third energy package"], *Tijdschrift voor Europees en Economisch Recht* 2010, nr. 11, pp. 455–467, pp. 458–459, Communication from the Commission on *Prospects for the internal gas and electricity market*, COM(2006)841 final. See Jones, *EU Energy Law*, Vol. I, 2010, pp. 3–8.

³⁰ Directive 2009/72/EC of the European Parliament and the Council of 13 July 2009 concerning common rules for the internal market for electricity and repealing Directive 2003/54/EC, OJ L EU 211/56 2009; Directive 2009/73/EC of the European Parliament and the Council of 13 July 2009 concerning common rules for the internal market for gas and repealing Directive 2003/55/EC OJ EU L 211/94 2009; Regulation 715/2009 of the European Parliament and the Council of 13 July 2009 on conditions for access to the natural gas transmission networks and repealing regulation 1775/2005 OJ EU L 211/36 2009; Regulation 714/2009 of the European Parliament and the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges of electricity and repealing Regulation 1228/2003, OJ EU L 211/15 2009 and Regulation 713/2009 of the European Parliament and the Council of 13 July 2009 establishing an agency for the cooperation of energy regulators, OJ EU L 211/1 2009.

³¹ Pront-van Bommel 2010, pp. 458–459. Communication from the Commission on prospects for the internal gas and electricity market COM(2006) 841 final.

³² S.A.C.M. Lavrijssen & I.E. Bordei, "Regulating and Supervising of Wholesale Energy Markets. What's in it for the Consumers?", *Oil, Gas & Energy Law Intelligence*, <http://www.ogel.org/about-author-a-z-profile.asp?key=2119> (advance publication) and OGEL 2013, nr. 5.

³³ Communication from the Commission, *Launching the Public Consultation Process on a New Energy Market Design*, COM (2015) 340 final.

³⁴ European Commission 2015, *ibid.*, p. 3.

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broad outlines of the most probable scenarios. The objective of a new electricity and gas bill considered within the Dutch legislature in 2015 (known as the “Stroom” bill in the Netherlands) was to lay the first cornerstone of a modern regulatory framework for the Dutch energy sector, by amending the existing Electricity Act and the Gas Act.³⁵ The Stroom bill was to clear the way for implementation of the new national policy on energy that had been jointly agreed by the government, business and industry, and civil society. The bill also sought to provide the building blocks for a transparent, competitive, and sustainable energy balance in 2050.³⁶ Yet, because of a disagreement between the Dutch Senate and the Minister of Economic Affairs Henk Kamp on the contentious issue of “unbundling” (discussed in more detail in section 3.1), a narrow majority in the Senate voted against the bill. Because elements of that bill were necessary for the Netherlands to meet its European and national sustainability obligations, a number of points that appeared in it were brought forward and have been incorporated into new legislative proposals.³⁷ The Stroom bill can be seen as a step forwards, towards sustainable energy provision, though its design was nonetheless still heavily biased towards the idea of an energy sector designed according to the old-fashioned market model.³⁸ It can therefore be expected that future legislative bills, informed by advances in scientific knowledge among other things, will be geared increasingly towards the energy transition in the rules they establish for the various market participants.

III. Transmission and Distribution System Operators in the Energy Transition

3.1 System operation

Transmission and distribution systems still, to this day, form the backbone of energy provision in the member states of the EU. These systems make it possible for energy to be transported, for it to be imported and exported, and ultimately, for it to be supplied to end-users. System operators thus fulfil a crucial role in ensuring the safety and reliability of supply for end-users. Like current legislation, the architecture of these transport systems is still based mainly on the traditional model of centralized production and supply of energy in response to demand from a passive end-user. We therefore expect billions of euros in investment to be needed over the coming years, to render these systems “smart”, among other things, by investing in the necessary IT applications and network designs.³⁹

According to Article 2, paragraph 3, of Directive 2009/72/EC, “transmission” includes the transport of electricity by the extra high-voltage and high-voltage

grid network, for the purpose of its supply to final customers or distributors, but the supply itself is not included. The member states are to appoint the operators of the transmission system, and these must be independent from the production and supply companies. To this end, the European directive sets strict unbundling requirements, which stipulate that transmission operators must be economically and legally autonomous from the supply and production companies and that ownership of the system must lie with the transmission system operator.⁴⁰ In the Netherlands, TenneT has been appointed operator of the electricity transmission systems and Gastransport Services as operator of the gas transmission network. The Government of the Netherlands is the sole shareholder in TenneT and in Gastransport Services. The Minister of Finance manages the government’s shares in both companies.

According to Article 1, paragraph 5, of Directive 2009/72/EC, “distribution” concerns the transport of electricity by high-, middle-, and low-voltage distribution systems for the purpose of its supply to consumers, though not including the supply itself. According to the sixth paragraph of Article 1 of Directive 2009/72/EC, a distribution system operator is a natural person or legal entity that is responsible for the operation, maintenance, and if necessary,

³⁵ Legislative proposal concerning rules with regard to the production, transmission, exchanges and supply of electricity and natural (Electricity Act and Gas Act), *Kamerstukken I* 2015/16, 34199, C.

³⁶ *Kamerstukken II* 2012/13, 30196, nr. 202.

³⁷ See further letter from the minister to the chairperson of the Senate, *Kamerstukken I* 2015/16, 31510, A, letter dated 22 January 2016. See also legislative proposal for amendment of Electricity Act 1998 (tijdig realiseren doelstellingen energieakkoord [timely achievement of energy accord targets]), *Kamerstukken II* 2015/16, 34401, nr. 1. See also consultation on amendment of the Electricity Act 1998 and of the Gas Act [progress towards an energy transition], <https://www.internetconsultatie.nl/voortgangenergietransitie>; accessed 28 April 2016.

³⁸ DNV-GL and CE Delft, 2015, chapter 6.3.2. See also the critical comments of M. Meijburg and R. Schalijs, “Afwijzen van wetsvoorstel Stroom een Blessing in disguise” [“Rejection of STROOM bill is a blessing in disguise”], *Energiea*, 14 January 2016.

³⁹ System operators in the Netherlands estimate that up to 2050, some €20 to €71 billion (dependent on the scenario examined) will have to be invested to replace and expand current systems in the Netherlands, Netbeheer Nederland, *Netbeheer voor de Toekomst*, p. 38, [Rapport%20Net%20voor%20de%20Toekomst.pdf](https://www.netbeheer.nl/Rapport%20Net%20voor%20de%20Toekomst.pdf); accessed 1 September 2016.

⁴⁰ Article 9 of Directive 2009/72/EC. For companies that were part of a vertically integrated enterprise prior to 3 September 2009, another model may be chosen. See S. Pront-van Bommel, “Het derde Energiepakket” [“The third energy package”], *SEW, Tijdschrift voor Europees en Economisch Recht* 2010, nr. 11, pp. 455–467.

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development of the distribution system in a particular area, as well as, if applicable, its interconnections with other systems. The distribution system operator must ensure that the system, over the long term, can meet any reasonable demand for distribution of electricity. European unbundling requirements for distribution companies are less far-reaching than those for the transmission systems, which require only legal and administrative unbundling. The Dutch legislature has nonetheless stipulated that the distribution systems must comply with the same unbundling requirements as the transmission system operators.⁴¹ After years of litigation in national and European courts, the Supreme Court ruled in 2015 that the group ban on distribution companies – which stipulates that network companies cannot be part of any group of enterprises that also includes companies which produce, supply, or trade in energy in the Netherlands – is not in violation of EU law.⁴² This means that the energy companies that had not been split up, Eneco and Delta, in principle still had to be. Essent had already divested its network, leading to creation of the network operator Enexis. Liander is the network company split off from NUON. The provincial and municipal governments are shareholders in the distribution system operators, and the law dictates that these must be in public hands.⁴³ During its discussions of the “Stroom” electricity and gas bill, the Senate urged the minister to postpone the required unbundling of the energy distribution systems. It was the minister’s unwillingness to consider a motion filed to this effect that led the Senate to vote against the Stroom bill. The consequence, however, was retention of the unbundling requirement, as this is stipulated in the current legislation. In principle, therefore, the system operator still has to be separate from the supply and production companies.⁴⁴

3.2 Functions and roles of system operators

The system operators have a legal monopoly in the implementation of the functions assigned to them.⁴⁵ For implementation of the relevant European legislation, lawmakers have provided a summary of the core functions of the system operator. Beyond these functions, the system operator may not, in principle, engage in any additional activities that could compete with other services or goods.⁴⁶ Roughly speaking, the current functions of the system operator can be divided into six core activities.

First, the system operator is responsible for operation of the system. The system operator develops, manages, and maintains the system so as to ensure reliability of supply, sustainability, and affordability of the transport of gas and electricity.⁴⁷ The system operator must, in the short term and in the long term, guarantee that sufficient transport capacity is available to meet any reasonably expected level of demand for the transport of electricity and gas. To that end, the system operator is to draw up investment plans, which

must be approved by the Authority for Consumers and Markets (ACM, see also section 5.3).

Second, the system operator is responsible for construction and maintenance of connections to the transmission or distribution system.⁴⁸ Everyone has the right to a connection to the energy system, and system operators must provide these.

Third, the system operator provides a system user, such as a consumer or a producer, upon their request, access to the system and transport electricity or gas on behalf of the system user.⁴⁹ In doing so, the system operator must act transparently and impartially.

Fourth, the system operator must ensure the safety of the system. Transmission system operators are responsible, among other things, for balancing demand and supply, so as to ensure the proper functioning of the energy system.⁵⁰ Some market participants (suppliers, traders, large buyers) have what is called “programme responsibility”. This means they are required to draw up programmes setting out their planned inputs and withdraws of energy from the network for the following day. They

⁴¹ The unbundling is provided for in the Independent Network Operation Act. European law still allows vertical integration in regard to distribution systems. Less far-reaching unbundling requirements are set than for transmission networks. See article 26 of Directive 2009/72/EC and article 26, first paragraph of Directive 2009/73/EC.

⁴² HR 26 June 2015, ECLI:NL:HR:2015:1727 (Government of the Netherlands v. Essent). The Supreme Court thereby confirming the preliminary verdict of the Court of Justice 22 October 2013, C-105/12 to C-107/12, ECLI:EU:C:2013:677, NJ 2014/21.

⁴³ The ban on privatization is in article 93 of the Electricity Act 1998

⁴⁴ There is an exception for closed distribution systems according to article 15 of the Electricity Act 1998. See article 4.4 of the Stroom Bill and p. 16 of explanatory memorandum on the Stroom Bill; Proposed law concerning the production, transmission, exchange and supply of electricity and natural gas (Electricity Act and Gas Act) *Kamerstukken I* 2015/16, 34199, C. There is also an exception for direct lines. See article 4.5. of the STROOM proposal and expanded in Pront-van Bommel 2010, pp. 466–467.

⁴⁵ See, for the tasks of the transmission system operators, article 12 of Directive 2009/72/EC and for the tasks of the distribution system operators article 25 Directive 2009/25/EC. See also article 13 and 25 of Directive 2009/73/EC. See article 16 etc. of the Electricity Act 1998.

⁴⁶ Article 17, first paragraph, of the Electricity Act 1998 and article 10b of the Gas Act.

⁴⁷ Article 16, first paragraph, of the Electricity Act 1998 and article 10, first paragraph, of the Gas Act.

⁴⁸ Article 16, first paragraph, under (e) of the Electricity Act 1998 and article 10, sixth paragraph, of the Gas Act.

⁴⁹ Article 16, first paragraph, under (f), of the Electricity Act 1998, article 14 of the Gas Act and article 5.10 of the Stroom bill.

⁵⁰ Article 16, second paragraph, under (a), of the Electricity Act 1998. Explanatory memorandum Stroom, p. 25.

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must then submit these programmes to the transmission system operator. Demand and supply must be balanced in the programmes. If this is not the case, the transmission system operators must bring the system into balance. They do this by buying in reserve and control capacity on the balancing market, the costs of which are passed on to the party which caused the imbalance.⁵¹ The role of the transmission system operator could change in this respect in the future. Due to the growing role of local facilities for sustainable energy provision (distributed generation), and the intermittent nature of these, local congestion (and capacity limitations) and imbalances in the network could become increasingly frequent occurrences in the distribution systems. By making distribution systems smarter, it becomes possible for distribution system operators to also play a role in balancing demand and supply and in applying local congestion management in the distribution systems.⁵² Prosumers or aggregators – these are companies that trade on behalf of a large group of consumers – could then, for example, supply flexibility services to the distribution system operators by using more or less energy or by producing it during periods of underloading or overloading of the capacity of the electricity system. At present, however, household consumers have no programme responsibility in the current system. They also have no access to flexibility markets, and they cannot as yet provide flexibility services to the transmission system operator. Energy suppliers have programme responsibility for household consumers. Usage data for household consumers is derived from standard user profiles.

Fifth, the distribution system operator is responsible for measuring the amount of energy used and produced. The distribution system operator also makes measurement devices available for small connections.⁵³ During the coming years, the traditional household meters will be replaced by “smart meters” that can be read out at a distance.⁵⁴ Use of smart meters paves the way for better insight into customers’ actual energy use. This also creates opportunities to deviate from standard user profiles when drawing up the energy programmes. This should make it easier to give consumers/prosumers a role in providing flexibility services.

Sixth, the system operators are responsible for providing system users the information they need to access the energy system efficiently and for providing information to (foreign) operators of other systems.⁵⁵ Thanks to the rise of smart local facilities for energy provision in which there is two-way traffic in energy flows, in addition to the new information that distribution system operators can read off smart meters, the distribution system operators will be better able to plan the management and functioning of the energy system. Because of these developments, the distribution system operators will also be better able to respond to possible imbalances and capacity problems

in the energy system.⁵⁶ New flows of information provide new opportunities for support services that the distribution system operators could offer to network users, such as those wanting to enter the market for flexibility service provision.⁵⁷ Under the condition that the applicable privacy laws are respected, these new opportunities will also require establishment of new rules governing cooperation and data exchanges between the transmission and distribution system operators and between distribution system operators, energy consumers, and other market players.

The current aim of lawmakers in the Netherlands is to clarify the functions of the system operators in future legislation. Debate is ongoing on the question of what functions the distribution system operator should be allowed to fulfil, beyond its core functions. Some researchers claim that system operators are currently too constrained to innovate in new, sustainable hybrid energy infrastructures, such as new storage infrastructures, charging points, and connections between different infrastructures such as heat and electricity.⁵⁸ They advocate allowing system operators to also fulfil (temporary) functions to stimulate the transition and promote competition. Others, however, claim that system operators must confine themselves to their core functions, so as not to distort competition in the development of alternative technologies and infrastructures.⁵⁹ Clearly the role of the transmission and distribution system operators will inevitably

⁵¹ TNO 2015, p. 22.

⁵² CEER, *The Future of the Role of DSOs, A CEER Public Consultation Paper*, Ref: C14-DSO-09-03, 16 December 2014.

⁵³ Article 16, first paragraph, under (n), of the Electricity Act 1998, article 10, fifth paragraph, of the Gas Act, article 5.12 of the Stoom bill, explanatory memorandum, p. 25.

⁵⁴ A smart metre is a digital metre that measure electricity use in almost real time (in intervals of 15 minutes) and can be read at a distance. R. Hoenkamp, G. B. Huitema & A. De Moor-van Vugt, “The Neglected Consumer: The Case of the Smart Meter Roll Out in the Netherlands”, *Journal of Renewable Energy Law & Policy*, 2011, nr. 4, 269–282.

⁵⁵ Article 16, first paragraph, under (l), of the Electricity Act 1998, article 10, second paragraph, of the Gas Act, article 5.22 of the Stoom Bill, explanatory memorandum, p. 26.

⁵⁶ EvolveDSO, *Development of methodologies and tools for new and evolving DSO roles for efficient DRES integration in distribution networks*, 2015, p. 35 and also, <http://www.evolvedso.eu/getattachment/6f0142bf-0e66-470c-a724-4a8cbe9c8d5c/Deliverable-1-4.aspx>; accessed 28 April 2016.

⁵⁷ EvolveDSO 2015, p. 33.

⁵⁸ Ecorys, *The role of DSOs in a Smart Grid Environment*, DG ENER, Amsterdam/Rotterdam, 23 April 2014. DNV-GL and CE Delft, 2015, par. 6.3.2. See also the critical comments of M. Meijburg and R. Schalijs, “Afwijzen van wetsvoorstel Stroom een Blessing in disguise” [“Rejection of STROOM bill is a blessing in disguise”], *Energiea*, 14 January 2016.

⁵⁹ DNV-GL and CE Delft, 2015, p. 67 etc.

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change as a result of the energy transition.⁶⁰ The distribution system operators are increasingly evolving from a passive system manager, based on the “network responding to demand” paradigm, into an active system manager, to which network users can provide services according to system management objectives. This evolution requires an adjustment of rules, processes, and roles associated with system operation.⁶¹ Although the overview sketched above indicates what the core functions of system operators are, the exact way these functions will be fulfilled and delegated will change in the future, in line with technological and economic developments, which could differ in each member state.

3.3 The role of the Authority for Consumers and Markets

The ACM and national oversight authorities in other member states play a key role in the regulation of system operators in accordance with the EU energy directives and national legislation in the various EU member states.⁶² As a consequence of European law, the discretionary (regulatory) powers of the ACM – including for establishing tariffs and the conditions for access to energy systems – have been greatly expanded.⁶³ The oversight authority has wide discretionary powers and can, based on those, weigh various interests against one another when establishing general rules or making a decision. Nonetheless, strict European independence requirements apply to national oversight authorities.⁶⁴ They must be independent from market participants, but must function to some extent at arm’s length from the political establishment as well (parliament and the Minister of Economic Affairs). That means the minister may set general policies that the national oversight authority has to comply with, but may issue no instructions pertaining to specific cases.⁶⁵ The strict requirement of independence is aimed at ensuring impartial and transparent regulation by the oversight authority. This is of particular importance in sectors that have traditionally been strongly interwoven with the government, and where the State, as in the energy sector, is still the sole (100 per cent) shareholder in market participants.⁶⁶

Unlike when a supervisory organ falls under the full responsibility of a minister and is accountable to that minister, political oversight of the ACM is, in principle, limited to the broad outlines. The minister is responsible for the legislative framework, including the oversight system, including responsibility for the setup and organization of regulation as a whole, as well as the functioning of the oversight authority.⁶⁷ During the discussions on the Stroom bill in the Dutch legislature, it became clear that the question of the ACM’s independence remained a contentious issue. The minister leaned towards a desire to retain authority for establishment of rules on the regulation of transmission and distribution systems, which brought him into conflict with the European require-

ment that the ACM has to be able to perform its regulatory functions independently.⁶⁸

To prevent network operators from abusing their dominant position, a tariff regulation system was established by which the ACM regulates conditions, tariff-setting methods, and tariffs for accessing the energy networks (both connections and the transport of energy). This regulation system stimulates network operators to operate cost-effectively and to keep the prices charged for network use at affordable levels. In addition, energy regulation aims to ensure the reliability and sustainability of the energy supply.⁶⁹ Directive 2009/72/EC enumerates objectives that national oversight authorities must take into consideration in the course of implementing their powers, such as stimulation of a competitively-gearred and, certainly from an environmental perspective, sustainable internal market. The Directive nonetheless leaves the member states substantial latitude in their exact implementation of tariff regulation.⁷⁰ It does stipulate, however, that such regulation be transparent and impartial.⁷¹

⁶⁰ EvolvDSO 2015.

⁶¹ EvolvDSO 2015, p. 27.

⁶² The literature often refers to these oversight organs as National Regulatory Authorities, abbreviated as NRAs.

⁶³ See article 37, first paragraph and fourth paragraph, of Directive 2009/72/EC and article 41, first paragraph and fourth paragraph of Directive 2009/73/EC. See also L. Hancher & P. Larouche, “The coming age of EU regulation of network industries and services of general economic interest”, in: P. Craig and G. de Burca (Ed.), *The evolution of EU law*, 2nd edn. Oxford, Oxford University Press, 2011, pp. 743–782.

⁶⁴ Article 35 of Directive 2009/72/EC and article 39 of Directive 2009/73/EC.

⁶⁵ See TIAT case 29 June 2010, ECLI: NL: CBB: 2010: BM9470; See also S.A.C.M. Lavrijssen & A. Ottow, “The fragility of independent agencies in the EU”, *Legal Issues of Economic Integration*, 2012, volume 39, nr. 4, pp. 419–445.

⁶⁶ See L. Hancher, P. Larouche & S.A.C.M. Lavrijssen, “Principles of good market governance”, *Journal of Network Industries*, 2003, nr. 4, pp. 361–362.

⁶⁷ The ACM is an independent administrative body (IAB); On this see S.A.C.M. Lavrijssen, *Onafhankelijke mededingingstoezichthouders, regulerende bevoegdheden en de waarborgen voor good governance* [*Independent competition oversight agencies, regulatory competences and assurances of good governance*], The Hague: Boom Juridische Uitgevers 2006, pp. 96–98 and L.M. Schouten & A.J.C. de Moor-van Vugt, “De onafhankelijkheid van de Autoriteit Consument en Markt” [“The independence of the Authority for Consumers and Markets”], *SEW* 2015, nr. 2, pp. 64–65;

⁶⁸ S.A.C.M. Lavrijssen, “Het wetsvoorstel Stroom, waar is de consument gebleven” [The Stroom Bill: What happened to the consumer?], *Energie Actueel*, November 2014.

⁶⁹ *Kamerstukken II* 2008/09, 31901, nr. 1–2, p. 44.

⁷⁰ Article 36, under (f), of Directive 2009/72/EC and article 40, under (f), of Directive 2009/73/EC.

⁷¹ Article 35, fourth paragraph, and article 37, sixth and seventh paragraph, of Directive 2009/72/EC and article 39,

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In addition, the ACM sets the network codes. These codes relate to common binding rules for energy markets.⁷² That is, they concern general rules that are binding in nature, repeatedly applicable, and not limited with regard to time, place, or topic. They are not aimed directly at specific customers. Network codes may include, among other things, rules concerning tariff structures, quality criteria, and the way system operators and system users interact with one another, as well as the way system operators interact with one another while carrying out their system operation functions. System operators play an important role in establishing the codes, because they are allowed to submit proposals for the codes to the ACM, after consulting on these proposals with organizations representing participants in the electricity or gas market. With the proposal sent to the ACM, the system operators must also include a summary of how they have taken into account the views and comments voiced by the representative organizations in the energy market.⁷³ Finally, the ACM sets the codes with due regard for the proposal submitted and consideration of the aims enumerated by law, such as the importance of maintaining a reliable, sustainable, efficient, and environmentally sound electricity and gas supply, promotion of trade, and promotion of effective action by system users.⁷⁴ The ACM must also determine whether the codes proposed are in compliance with European law and the European network codes, which are set by the European Agency for the Cooperation of Energy Regulators (ACER) and the European Commission.⁷⁵

IV. Legal Protection: How is Participation in Administrative Procedures Provided?

4.1 The importance of the participation of energy consumers in regulatory proceedings

The previous section set out the principles guiding regulation of the energy market and the role of the ACM. This section examines the principles underlying ex ante legal protection for the energy consumer in the transition towards a sustainable energy supply.

The oversight authority establishes, among other things, maximum network tariffs and the financial incentives permitted to stimulate energy-efficient use of the network by consumers/prosumers. As such, it has considerable influence on energy prices and the way consumers/prosumers use energy. It is therefore very important for energy consumers that network regulation take place lawfully and reasonably. Considering that political control of the activities of oversight authorities is restricted to the broad outlines, the question may arise as to how it can be ensured that national regulatory bodies make proper use of their wide discretionary powers. In fact, it is also appro-

priate for an oversight authority to provide accountability by more direct means to the public and all those it affects, such as energy consumers, about the way it interprets and performs its mandate.⁷⁶ Direct public accountability plays a role in increasing support for the activities of the oversight authority among participants in the regulated market and others who are affected. Accountability mechanisms, after all, increase the legitimacy of the oversight authority, because accountability is offered openly and publicly to energy customers.⁷⁷ This fosters growing confidence in and support for the oversight activities carried out by the oversight authority.⁷⁸ Beyond providing transparency on policies, other important forms of direct public accountability are holding public consultations and encouraging affected parties to participate in decision-making. By participating in public decision-making procedures, affected consumers/prosumers can make their views known in defence of their rights and position. In doing so, they may be able to influence decisions of the oversight authority before those decisions become final. Public accountability and the participation of affected stakeholders are therefore strongly linked. As a consequence of consumer participation the quality and support for administrative decisions may rise, which may prevent consumers appealing the decisions at the courts.

Once a definitive decision has been made, affected consumers/prosumers, if deemed eligible, can still file

cont.

fourth paragraph, and article 41, sixth paragraph, and article 41, thirteenth paragraph, of directive 2009/73/EC.

⁷² TIAT 2 August 2002, ECLI:NL:CBB:2002:AE7254.

⁷³ Article 27, 31 and 32 of the Electricity Act 1998 and article 12 etc. of the Gas Act.

⁷⁴ Article 36 of the Electricity Act 1998.

⁷⁵ M. L. P. Groenleer, "Toezicht op de energiesector; tussen nationale belangen en Europese invloed" ["Oversight of the energy sector: A balance of national interests and European influence"], *SEW* 2015, nr. 9, pp. 385–397 and S.A.C.M. Lavrijssen & L. Hancher, "Networks on Track: From European Regulatory Networks to European Regulatory Network Agencies", *Legal Issues of Economic Integration* 2009, nr. 1, pp. 23–55.

⁷⁶ P. Larouche, *CERRE, Code of Conduct and Best Practices for the setup, operations and procedure of regulatory authorities*, 2014, pp. 17–18.

⁷⁷ M. Aelen, *Beginselen van goed markttoezicht: Gedefinieerd, verklaard en uitgewerkt voor het toezicht op de financiële markten* [Principles of good market oversight: Defined, explained and elaborated for financial market oversight], The Hague: Boom Juridische Uitgevers 2014, p. 360.

⁷⁸ M. Bovens, "Analysing and assessing public accountability: A conceptual framework", *European Law Journal* 2007, volume 13, nr. 4, pp. 447–468, S.A.C.M. Lavrijssen & B. Vitez, "Principles of Good Supervision and the Regulation of the Dutch Drinking Water Sector", *Competition and Regulation in Network Industries*, 2015, nr. 3, pp. 219–255.

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an appeal if desired with the administrative court to seek protection of their rights. Regulations governing the jurisdiction of administrative courts in the Netherlands designate the Trade and Industry Appeals Tribunal (TIAT) as the competent body for rulings on decisions based on the Electricity Act or the Gas Act.⁷⁹ This paper reviews the legal and actual possibilities that consumers have for making their views known to national oversight authorities before decisions become final (ex ante) and how national oversight authorities must take those views into account.⁸⁰

4.2. Ex ante legal protection: Participation to protect the rights of energy consumers

This contribution views participation as a key prerequisite for protecting the rights of energy consumers before a decision has been made final by an oversight authority.⁸¹ This principle assumes that participation by affected stakeholders – such as energy customers, consumer groups, special interest groups, and NGOs – in administrative procedures is essential for good economic oversight and for high-quality regulatory decision-making.⁸² The European Court of Justice (ECJ) has implicitly recognized this participation principle. In *Council v. Access Info Europe*, the ECJ observed that access to documents is a form of transparency that has the benefit of enabling better participation of citizens in decision-making processes.⁸³ Article 11 of the Treaty on European Union (TEU) also makes reference to the principle of participation, as does Article 6 of the Aarhus Convention, which grants the public the right to participate in environmental decision-making procedures, among which energy projects could be included.⁸⁴

Alemanno argues that now that the principle of participation has been reaffirmed in European treaties and European legislation, the “judicialization” of participation requirements by the ECJ can be expected.⁸⁵ The Commission has stated that “improved participation is likely to create more confidence in the end result”.⁸⁶ The building of greater confidence in the end result thus goes hand in hand with participation in the procedure leading to that end result. In this respect, enforceable participation rights are important for expanding support for intervention by an oversight authority. Non-enforceable rights are probably less suitable for this purpose, because they offer fewer guarantees.⁸⁷ In this regard, it is relevant that Article 10 of Regulation 2013/2009 concerning ACER’s establishment includes a legal anchoring of the right of participation by affected market participants. That article formulates participation rights in ACER procedures very broadly. These rights apply to all market players and consumers wishing to make their views heard. The energy directives, in contrast, contain very few procedural provisions for the national authorities. That means customers’ right to

participate vis-a-vis national oversight authorities depends on national procedural rules, in accordance with the principle of national procedural autonomy.⁸⁸ As will be discussed later, participants in the energy market can take part in ACM decision-making procedures leading up to regulatory decisions if they fall into the category of “interested parties” as defined

⁷⁹ This follows from annex 2, article 4 GAL. The District Court of Rotterdam ruled in the first place on decisions regarding administrative fines and incremental penalty payments.

⁸⁰ Other papers look at the options consumers have for resorting to a European or national court to appeal a decision after it has become final (ex post legal protection), see footnote 18.

⁸¹ On this principle, see also: S.A.C.M. Lavrijssen, *Onafhankelijke mededingingstoezichthouders en de waarborgen voor good governance* [Independent competition oversight agencies and assurances of good governance], The Hague: Boom Juridische Uitgevers 2006, pp. 57–58, H. Addink, “Principles of Good Governance: Lessons from Administrative Law”, in: D. Curtin & R. Wessel (Ed.), *Good Governance and the European Union: Reflections on Concepts, Institutions and Substance*, Antwerp – Oxford – New York: Intersentia, 2005, p. 39, J. Mendes, “Participation in EU Rulemaking: A Rights-based Approach”, Oxford: Oxford University Press, 2011 and A. Alemanno, “Unpacking the Principle of Openness in EU Law: Transparency, Participation and Democracy”, *ELR* 2014, nr. 1, pp. 72–90.

⁸² Lavrijssen & Vitez, 2015, p. 237.

⁸³ ECJ 17 October 2013, *Council v. Access Info Europe*, C-280/11 P, ECLI:EU:C:2013:671, para. 32.

⁸⁴ See also J. Mendes (2011), “Participation and the Role of Law after Lisbon: A Legal View on Article 11 TEU”, *Common Market Law Review*, 2011, nr. 6, pp. 1849–1878. J.H. Jans, “Vloeiende rechtsbescherming, Enkele opmerkingen over bestuursprocesrecht, de Crisis- en Herstelwet en het Verdrag van Aarhus” [“Fluid legal protection: Remarks on administrative procedural law, the Crisis and Recovery Act and the Aarhus Convention”], in: M.N. Boeve (Ed) *Kansen Voor Het Omgevingsrecht. Opstellen Aangeboden Aan Prof. Mr. N.S.J. Koeman [Opportunities in Environmental Law: Propositions Presented to Prof N.S.J. Koeman]*, pp. 329–342, Europa Law Publishing; Groningen, December 2009.

⁸⁵ Alemanno 2014, pp. 72–90.

⁸⁶ European Commission, *European Governance: A White Paper*, COM(2001) 428 final, p. 7.

⁸⁷ Alemanno 2014, pp. 72 etc.

⁸⁸ The principle of procedural autonomy means that the member states have competence and responsibility to determine the application and design of procedures. See further J. H. Jans, “Naar een Europees Awb(?) Enkele opmerkingen over het slaan van piketpaaltjes, rechterlijke dialoog en harmonisatie via de achterdeur” [“Towards a European Administrative Law Act: Remarks on setting boundaries, judicial dialogue and harmonization via the backdoor”], in: T. Barkhuysen, W. den Ouden & J.E.M. Polak (Ed.), *Bestuursrecht harmoniseren: 15 jaar Awb [Harmonization of Administrative Law: The Dutch GAL 15 Years Later]*, The Hague: Boom Juridische Uitgevers 2010, p. 610.

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by Article 1.2 of the Netherlands General Administrative Law (GAL) (see also section 5.2). For individual energy consumers it is a major disadvantage that the interested parties status, in principle, is not granted to individual consumers, due to the lack of a sufficiently immediate personal interest.⁸⁹ Consumer groups that qualify as representative organizations can be designated as interested parties. They enjoy, in some cases, a privileged right to participate as interested parties in administrative and legal procedures (see also section 5.2).⁹⁰

V. Legal Protection of Energy Consumers in Practice

5.1 Legal protection under pressure

Ex ante legal protection, via hearing procedures and participation, and ex post legal protection via judicial review of decisions affecting the position of energy consumers, have become sensitive issues. Indeed, due to political and judicial developments at both the European and the national level legal protection of energy consumers has come under pressure.⁹¹ Five developments illustrate that gaps have already emerged in legal protection, even now, before any legislation concerning the energy transition has entered into force. We refer here to the following developments:

1. The tendency to curtail legal protection with national legislation;
2. The lack of adequate hearing procedures and limited opportunities for appeal against investment plans submitted by system operators;
3. Very marginal (superficial) review by the courts of regulatory decisions in the energy sector;
4. Europeanization of oversight and expansion of ACER's role in the transport of cross-border flows of energy;
5. The rise of local sustainable energy cooperatives and their partial exemption from oversight by the ACM.

This article will especially discuss developments 1, 2 and 5. It focusses on issues frustrating ex ante legal protection of the energy consumers with regard to regulatory decisions of the Authority for Consumers and Markets that affect their rights and interests.⁹²

5.2 Curtailment of legal protection by the legislature: The Streamlining Act and efforts to revamp energy law

Although the legislation recently rejected by Dutch lawmakers – the “Stroom” bill – aimed to simplify energy law and render it more transparent and modern, the legislator has not yet moved to improve administrative decision-making processes and participation opportunities for energy consumers. This is a missed opportunity, as a key objective of the EU directives is in fact the strengthening of consumers’

position. In addition, the distribution system operators and energy consumers are poised to play an increasingly active role in the management of the energy system, which means that it will be important to involving them in advance and by adequate means in tariff-setting and establishing conditions for access to energy systems.

An earlier evaluation of energy-related legislation concluded that more detailed and elaborate provisions were needed for the regulation of preparatory procedures leading up to the ACM's adoption of code decisions and method decisions.⁹³ Energy consumers have limited opportunities for participation, and in ACM decision-making processes they often feel their voices go unheard. Within the current legal and regulatory context, it remains unclear how the contributions of interested parties are considered in real terms within decision-making processes, which leads to legal uncertainty about the position of stakeholders.⁹⁴ It is also uncertain whether consultation with these parties is incorporated in decision-making procedures, and if so in what way.⁹⁵

More clarity could be provided about the role of the preliminary consultations between network users and network operators on the code proposals, the participation of consumer groups, the minimum quality requirements for code modification proposals, the way system operators and the ACM are to take any comments and views expressed by representative organizations into account, and means by which feedback is to be provided to the organizations which expressed views. Unfortunately, such detailed procedural provisions were not yet included in the “Stroom” bill.

The discussion paper that accompanied that bill, on which the Minister of Economic Affairs held a series of public hearings in the lead-up to the bill's consideration by the legislature, proposed giving

⁸⁹ Article 1:2, first paragraph, of the General Administrative Law Act, TIAT 20 August 2010, ECLI: NL: CBB: 2010: BN4700.

⁹⁰ Article 1:2, third paragraph, of the General Administrative Law Act.

⁹¹ See S.A.C.M. Lavrijssen, “Legal safeguards for energy consumers in the energy transition”, TILEC discussion paper 2016, nr. 18.

⁹² See for a discussion of development 3 the literature referred to in footnote 18. For development 4 see; S.A.C.M. Lavrijssen, “Legal safeguards for energy consumers in the energy transition”, TILEC discussion paper, 2016, nr. 18.

⁹³ Evaluation of the Electricity Act 1998 and the Gas Act, Final Report, The Hague, April 2012.

⁹⁴ See also Robert Hensgens, Paul Nillesen, Stephen Littlechild & Bert Tieben, “De nieuwe netwerkregulering: macht aan de klant” [“Network regulation new style: Power to the customer”], *Me Judice*, 11 February 2016 and Lavrijssen, Eijkens & Rijkers 2014, p. 28.

⁹⁵ *Ibid.*

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organizations representing interested market parties a “right of initiative”, meaning that they could propose modifications to the technical codes and tariff codes.⁹⁶ This right, regrettably, did not make it into the final bill, which ultimately was shot down by the Senate. Such a right would have significantly improved the legal status of organizations representing energy consumers, because it would have given them more options for exercising influence on the content of the codes before their adoption.

Instead of improving the legal status of consumers, the legal protection status of consumers was in fact pared down, though this went largely unnoticed. According to Dutch General Administrative Law (GAL), a limited number of interested parties, defined in GAL Article 1:2, para. 1, are eligible to participate in administrative procedures, to file objections and to appeal decisions of the ACM. Interested parties are those deemed as having an objectively determinable, current and personal interest that is directly impacted by the decision.⁹⁷ As regards legal persons, according to Article 1:2, para. 3, of the GAL, their interests are deemed to include the general and collective interests which they specially represent in accordance with their objects and as evidenced by their actual activities.⁹⁸ In 2004, lawmakers had decided to ease access for representative organizations to administrative procedures and courts by adopting a provision stipulating that representative organizations in the energy market would be designated as interested parties in decisions made on the basis of the Electricity Act and the Gas Act (Article 82 Electricity Act 1998 and Article 61 Gas Act). This meant it was no longer necessary for representative organizations to demonstrate an immediate interest in every element of an ACM decision. The fact that an organization was representative was sufficient for it to receive *locus standi* regarding decisions taken on the basis of the Electricity Act and the Gas Act. The representative organization was required to possess legal personality and its representativeness had to be evident from its statutes and actual activities.⁹⁹ This expansion of *ex ante* and *ex post* legal protection was of key importance for energy consumers, because independently they were seldom recognized as interested parties in the regulatory decisions made by the ACM. The “Streamlining Act”, aimed at simplifying the regulatory functions of the ACM,¹⁰⁰ has restricted that privileged position by stipulating that representative organizations must not be automatically deemed interested parties in specific decisions, such as tariff decisions.¹⁰¹ Article 82 of the Electricity Act (comparable with Article 61 of the Gas Act) now reads as follows:

“A representative organization of parties in the electricity market shall be deemed as an interested party, in a decision, though not being decisive, taken on the basis of this act.”

As a result, a representative organization in the

energy market, when wanting to participate in an administrative proceeding or wanting to file an appeal against a specific decision, must meet the test of Article 1:2, paragraph 3, GAL. The precise consequences of this change are unclear as yet. It will not always be easy for representative organizations to demonstrate that they are directly affected by specific decisions of the ACM, such as tariff decisions made for the individual network operators and regulating the tariffs the operators may charge to the system users connected to their network. Such decisions pertain, after all, to the individual network operators and not to the representative organizations. This connotes a deterioration of the *ex ante* and *ex post* remedies for legal protection available to organizations representing consumers in the energy market. This development is particularly worrying in light of the difficulty of designating individual consumers as interested parties in a regulatory decision (see also section 4.1.1).

5.3 Barred access to proceedings related to investments plans

In addition to meeting the definition of interested parties, in some cases, crucial decisions made by the ACM – and which have major implications for the affordability of energy tariffs – are not made via open and sound transparent administrative proceedings and are not subject to appeal. An example is ACM approval of the capacity and investments plans of system operators. These plans underpin the investment decisions made by system operators and therefore play a role in determining network tariff levels.

At present, national and regional network operators, in accordance with Article 8, paragraph 2, of the

⁹⁶ Discussion paper on Stroom <https://www.internetconsultatie.nl/stroom>; accessed 1 September 2016.

⁹⁷ R.J.N. Schlössels & S.E. Zijlstra, *Bestuursrecht in de sociale rechtsstaat* [Administrative law in the welfare state], Deventer: Kluwer, 2010, pp. 173–174. P. Maandag & J. Kranenburg, “Belang of belang: een overzicht van belanghebbenden jurisprudentie uit het energierecht” [“Interested or not: An overview of interested parties in the jurisprudence of energy law”], *Nederlands Tijdschrift voor Energierecht* 2008, nr. 4/5, p. 245.

⁹⁸ TIAT 9 August 2010, ECLI:NL:CBB:2010:BM7799.

⁹⁹ TIAT 9 August 2010, ECLI:NL:CBB:2010:BM7799, ro. 2.2.3, TIAT 10 November 2010, ECLI: NL:CBB:B05329, par. 2.2.3 and E. van Leeuwen, “Representatieve organisaties in het energierecht” [Representative organizations in energy law], *Nederlands Tijdschrift voor Energierecht*, 2010, nr. 3/4, pp. 146–157.

¹⁰⁰ Law dated 25 June 2014 amending the act establishing the Authority for Consumers and Markets and a number of other laws concerning the streamlining of the market oversight to be performed by the Authority for Consumers and Markets, *Staatsblad* 2014 nr. 247.

¹⁰¹ See article VII section M and article IX, section K, of the Streamlining Act.

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Gas Act and Article 21, paragraph 2, of the Electricity Act 1998, are required to submit a Quality and Capacity Report (QCR) each year.¹⁰² A key component of the QCR is the investment plan. The investment plan must identify, for example, the capacity needs, bottlenecks, and risks associated with the quality of transport. In addition, the plan must present solutions to these. In accordance with Article 21, paragraph 8, of the Electricity Act, the ACM grants approval of such reports if, in the opinion of the ACM, they demonstrate that the network operator can, to a sufficient degree and in effective fashion, achieve the objectives they have set. In the present system, the Minister of Economic Affairs plays an important role in evaluation of large investments of national importance, such as expansions of electricity and gas transmission systems.¹⁰³ In carrying out such evaluations, the Minister of Economic Affairs places particular emphasis on the need to maintain a sustainable, reliable, and efficient energy supply. The system operator must justify the need for a project. Then, the Minister of Economic Affairs reviews the project, looking specifically at its necessity. Finally, the Minister of Economic Affairs and the Minister of Infrastructure and Environment formulate a resolution regarding the spatial planning aspects of any new trajectory.¹⁰⁴ The ACM does not evaluate in advance, whether a major project is necessary, but it does evaluate in retrospect whether the costs incurred for the project were not excessively high. The effective costs of such a project may be recouped via tariffs.¹⁰⁵

In a critical report the Dutch Court of Auditors recently concluded that the minister and ACM had not adequately assured the efficiency of investments made by TenneT.¹⁰⁶ Efficiency here pertains to the question of whether the investments were indeed necessary and were not excessively costly. It is therefore impossible to determine whether the tariffs charged by TenneT for the transport of electricity are too high or too low. Both the government of the Netherlands and the ACM must rely primarily on information supplied by TenneT itself in their evaluation of the necessity and the cost of investments.¹⁰⁷ They do not examine whether the network operator has chosen the most effective alternatives. The Minister of Economic Affairs bases evaluations of the major investments planned by TenneT exclusively on what TenneT states in its Quality and Capacity Report (QCR) regarding the necessary improvements and modifications to the network. In fact, the ACM should provide an overall assessment of the quality and capacity aspects of the reports, but it does not do so in practice. Neither has the Minister of Economic Affairs taken steps as yet to ensure that such assessments are forthcoming.¹⁰⁸

In response to the Court of Auditors' report, the Minister of Economic Affairs and the ACM did acknowledge that there was scope for improving the transparency of responsibilities for overseeing the necessity of investments.¹⁰⁹ In that light, it proposed

a number of modifications to the Stroom bill – the bill that the Senate rejected. The modifications have in the meantime have been incorporated into a new bill geared towards ensuring progress towards the energy transition.¹¹⁰ The largest change planned is discontinuation of the QCRs. The system operator would instead be required to submit an investment plan every two years. The ACM would have the explicit task of reviewing the necessity of investments in energy systems as part of its evaluation of the investment plan. If a draft investment plan pertains to a transmission system, it would be evaluated by the Minister of Economic Affairs as well. The Minister of Economic Affairs reviews investments in the transmission networks to determine the extent that they take sufficient consideration of developments in the energy market. The minister would be required to keep parliament informed during the course of such reviews. Furthermore the proposal provides that interested parties would have opportunities to express their views in advance regarding the system operators' draft investment plans. The system operator would be required to incorporate into the plan any comments and views submitted and finalizes the plan with due regard for the outcomes of those discussions and the evaluation by the ACM. The current proposed legislative bill does not require that the plan be explicitly approved or endorsed by the ACM. The investments included in the plan are, according to law, considered necessary. On those grounds, their costs

¹⁰² In the Regulation on Quality Aspects of Electricity and Gas System Operation (Regeling Kwaliteitsaspecten Netbeheerder Elektriciteit en Gas) further substantive requirements are made for the QCRs, <http://wetten.overheid.nl/BWBR0017793/2015-10-01> accessed 28 April 2016. See articles 11 and 16 of the Regulation.

¹⁰³ Article 20(e), first paragraph, in conjunction with 20(e), third paragraph, of the Electricity Act 1998.

¹⁰⁴ This decision still applies via the "State Coordination Scheme" (Rijkscoördinatieregeling). See article 20(a) and 20(b) of the Electricity Act 1998. This procedure will be amended upon implementation of the new Environmental Planning Act. *Kamerstukken II* 2013/14, 33 962, nr. 3, p. 311 (explanatory memorandum), *Staatsblad* 2016, nr. 156.

¹⁰⁵ Court of Audits (Algemene Rekenkamer), *Investeren in TenneT in Nederlands Hoogspanningsnet [TenneT investments in High-Voltage Grid in the Netherlands]* 2015, p. 31. See article 20(d) of the Electricity Act 1998.

¹⁰⁶ Court of Audits 2015, p. 7.

¹⁰⁷ Court of Audits 2015, p. 30.

¹⁰⁸ Court of Audits 2015, p. 46.

¹⁰⁹ See <https://www.rijksoverheid.nl/documenten/kamerstukken/2015/06/01/bestuurlijke-reactie-rapport-algemene-rekenkamer-investeren-tennet-in-nederlands-hoogspanningsnet>; accessed 1 September 2016.

¹¹⁰ Article S, legislative proposal legislative proposal to stimulate progress towards an energy transition, <https://www.internetconsultatie.nl/voortgangenergietransitie>; accessed 1 September 2016.

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may be factored into the network tariffs charged by the system operators.

From the methodology described above, we can conclude that in the proposed system, unlike the present system, a clear point exists at which the necessity of the investments is evaluated by the ACM and system operators. It also provides, unlike before, an opportunity for interested parties to voice their concerns in advance. The question, however, is whether this wouldn't turn out to be just a formality in actual practice, and whether the procedure would be implemented in such a way that consumers do feel their voices have been heard. After all, citizens participating as interested parties in procedures related to energy projects have not always considered this to be a positive experience. Huge numbers of complaints have been filed by people residing near large infrastructure projects. These repeatedly note citizens' sense of not being heard by the involved local and regional authorities.¹¹¹ Hearings and consultation procedures, similarly, often turn out to be a disappointment to citizens. This is illustrated, for example, by research done on a wind farm project near the city of Houten.¹¹² Citizens reported feeling that their involvement was very inadequate in the decision-making process on the wind turbines.¹¹³ They also expressed a lack of confidence in the agencies involved.¹¹⁴ In the Houten case, for example, some 50 per cent of area residents were not informed about the plans for construction of the wind turbines.¹¹⁵ Researchers observe that the negative attitudes towards the wind farm might have been alleviated by, for one thing, involving residents more effectively and earlier on in the decision-making process.¹¹⁶ More fundamentally, the question can be asked of whether the proposed amended process would in fact lead to a better assessment of the need for investments. First of all, the ACM would evaluate the investments based only on their reasonableness, without any detailed assessment of the effectiveness of various alternatives. This is a major problem, because once plans are approved by the ACM and adopted by the system operators, the necessity of the investments becomes a given. That means system operators may factor the (effective) costs of these investments into tariffs. It must be noted in this respect that billions in investments by system operators is expected to be needed over the coming years. The approval of investment plans, therefore, has major implications for citizens. This means there will remain a large risk of investments not being necessary and effective, and of system users having to pay too-high tariffs as a result. In addition, the Minister of Economic Affairs will retain the current major role in review of investments in the transmission networks. This role, however, is at odds with the European provisions regarding independent market oversight (see section 3.3), which requires regulation of the conditions and tariffs governing access to transmission networks must take place to some extent indepen-

dently from the political establishment and market participants (so also independent of the state as shareholder). In fact, the system contains no special guarantees to prevent the minister from issuing specific instructions regarding specific projects when reviewing the investment plans.

While the ex ante review still leaves much to be desired, the legal protection in retrospect is also deficient. Once an investment plan is adopted, it is not the intention, under the law, that interested parties then be eligible to contest that by appeal to an administrative court. The assumption is that the plans establish only the necessity of the investments, for which further elaboration is required.¹¹⁷ The proposed new rules governing adoption of investment plans lack even an explicit decision by the ACM granting its approval, meaning that legal protection for interested parties wanting to contest the plans in an administrative court becomes impossible.¹¹⁸ This illustrates that there are gaps in both the ex ante and the ex post legal protection of interested parties with regard to the investment plans. Yet, the investment plans have major implications for energy consumers/prosumers. It is therefore crucial that adequate ex ante and ex post safeguards be established for energy consumers in adoption of the investment plans.

¹¹¹ See R. van Est & A. van Waes, *Elf lessen voor een goede Energiedialoog* [Eleven lessons for a productive Energy dialogue], Rathenau Instituut 2016, p. 68.

¹¹² R. Harmsen, F. Van Rijnsoever & K. Broecks, *Evaluatie Windpark Houten. Een evaluatie rapport geschreven door het Copernicus Instituut voor Duurzame Ontwikkeling, (Universiteit Utrecht) in opdracht van de gemeente Houten* [Evaluation of a wind farm project: An evaluation report written by the Copernicus Institute of Sustainable Development, University of Utrecht, commissioned by the municipal government of Houten], University of Utrecht, 2015, p. 72, (<http://www.rtvutrecht.nl/data/docus/687805.pdf>).

¹¹³ Evaluation of the Houten wind farm project, 2015, p. 72.

¹¹⁴ Evaluation of the Houten wind farm project, 2015, p. 6.

¹¹⁵ Evaluation of the Houten wind farm project, 2015, p. 72.

¹¹⁶ Evaluation of the Houten wind farm project, 2015, p. 72.

¹¹⁷ *Kamerstukken II* 34199, nr. 7, p. 59.

¹¹⁸ If the network operator formulates the plan, it is unlikely to be a decision subject to appeal of an administrative body. The plan is then more likely to be considered a private act of the network operator. If the ACM were to approve or endorse the plan, it could be argued that such a plan could be designated as a decision having general application, against which a route of appeal is available via administrative court. R.J.N. Schlössels & S.E. Zijlstra, *Bestuursrecht in de sociale rechtsstaat* [Administrative law in the welfare state], Deventer: Kluwer 2010, p. 278. Against a plan, being a decision having general application, not being a generally binding regulation or policy, appeal is available for interested parties pursuant to article 8.1 of the General Administrative Law Act.

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5.4 Decentralization

It may appear paradoxical that alongside the trend towards Europeanization, another trend is observed: that of decentralization and emergence of local sustainable energy provision. Although the influence and scope of this decentralization trend as yet unclear, European and national legislatures are increasingly taking this development into account. To gain greater understanding of how local facilities for sustainable energy supply function and whether rules regarding oversight and regulation should be applied unabridged to local sustainable initiatives, the Minister of Economic Affairs in the Netherlands has adopted a governmental decree permitting experiments with decentral sustainable energy supply.¹¹⁹ This decree grants the minister authority to diverge from the 1998 Electricity Act for cooperatives of consumers and owners' associations in operating local sustainable energy facilities. This means that applicants for such an exemption are not required to meet the provisions regarding unbundling. It then becomes possible, in the context of the experiment, for the entire electricity provision chain (generation, supply, distribution, and use) to reside under the management of the cooperative or owners' association.¹²⁰ In the experiments derogation from rules regulating tariffs and conditions is also allowed. Furthermore, no supplier license needs to be applied for.¹²¹ The association is the local supplier in the experiment area and is not obliged to supply outside that area.¹²² The decree is based on the assumption that within a particular experiment, the participants will align their demand for energy better with the supply provided by local energy facilities. Production inputs will therefore be better utilized, and there will be lower peak loading of the distribution system. Therefore, standard consumer profiles need not be used.¹²³ It is also permitted for the costs and benefits of the energy facilities to be distributed differently than the generally applicable tariff structures and the method and tariff decisions of the ACM. The ACM will not set the tariffs, instead limiting itself to the review prescribed by European law of the method by which network tariffs are set.

This is rationalized in the explanatory notes accompanying the decree as follows:

“By taking part in a cooperative or an owners' association, the consumer chooses to exercise a type of governance. The purpose of that governance is to safeguard consumer interests, which is a function now fulfilled by the law and the oversight authority. Members of the association are producers, suppliers, consumers, and, in the case of a project network (see section 2.2.1), network operators together, and in the context of the association they can call one another to account on matters of tariffs and conditions. By applying for an exemption for an experiment, association members opt out of the consumer protection that the law requires suppliers and network operators to provide. In its stead, they

take upon themselves the responsibility for electricity provision for themselves and their surroundings. (...)”¹²⁴

The legislature thus expects participation of energy consumers in the supply of energy to ensure that the consumer interests of affordability, reliability, and sustainability are guaranteed. The question this raises is whether consumer participation is in fact an adequate substitute guarantee (in full or in part) for consumer oversight by the ACM. In answer to this question, little is known as yet. What happens, for example, if a member wants to leave the cooperative? Can this automatically be allowed, and if so under what conditions? And what happens if the energy facilities do not function adequately? Who will take over? Who is responsible for any damages? And what if someone disagrees with the prices and conditions set for the supply of energy from the cooperative? Can a member then easily switch to another energy company? What body can a consumer call upon in case of a dispute? Answers to some of these questions will be in the statutes of the cooperatives. However, where ambiguities remain, the question remains of whether energy consumers are sufficiently protected. After all, if energy consumers generate energy themselves and supply energy to one another within the cooperative, it might even be questioned whether they still can be considered consumers in the sense of being referred to under the consumer protection and energy directives.¹²⁵ The consequence would be that they could no longer file administrative appeals or civil actions based on the general and specific consumer protection provisions in European and national legislation. They must then fall back on general rules governing

¹¹⁹ Decree on experiments in decentralized sustainable electricity generation, *Staatsblad* 2015, nr. 99 and explanatory notes p. 15. The intention is to enlarge the leeway for experimentation in the near future.

¹²⁰ The experiments allowed by the decree differentiate between project grids and normal grids. See *Besluit experimenten decentrale duurzame elektriciteitsopwekking* [decree on experiments in decentralized sustainable electricity generation], *Staatsblad* 2015, nr. 99 and explanatory notes p. 15.

¹²¹ According to article 2 and 12 of the Decree, explanatory notes, p. 14.

¹²² Article 13 of the Decree.

¹²³ Explanatory notes, p. 11.

¹²⁴ *Staatsblad* 2015, nr. 99 and explanatory notes p. 11.

¹²⁵ A. Butenko & K.J. Cseres, “The regulatory consumer: Prosumer-driven local energy production initiatives”, *Amsterdam Centre for Energy Working Papers Series* 2015, nr. 1, pp. 5–6. According to article 2, tenth paragraph, of Directive 2009/72/EC, a household customer means “a customer purchasing electricity for own household consumption, excluding commercial or professional activities”. See also ECJ 16 July 1990, case C-210/96 *Gut Springenheide GmbH v. Oberkreisdirektor des Kreises Steinfurt - Amt für Lebensmittelüberwachung*, *Jur.* 1998, pp. I-4657, ro. 37.

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associations from Book 2 of the Dutch Civil Code and on good faith and reasonableness and fairness regarding conditions and prices in contract law.

It is therefore risky to assume all too readily that oversight by the ACM can be replaced, even partially, by consumer participation via a cooperative, without this being underpinned by sound research on how such cooperatives function. It is crucial that more research be done on the functioning of such cooperatives in practice, on their statutes, their consequences for legal protection of members, and the private contracts governing relationships among participants.

5.5 Synthesis

The analysis above illustrates, drawing on three developments, the pressure that *ex ante* (and *ex post*) legal protection for energy consumers is under pressure. Procedural innovations are needed to strengthen the voice and participation of energy consumers/prosumers in the procedures leading up to energy regulation decisions affecting consumer/prosumer interests with respect to an affordable, reliable, and sustainable energy supply. Strengthened voice will become even more important in the future, as consumers/prosumers play an even more active role in the functioning of the energy system. It is therefore important to provide them with better opportunities for exerting influence in advance on the conditions established and the tariffs set for accessing the energy system. Building support for the substance of energy decisions can help prevent the need for lengthy and costly judicial proceedings after the fact. If a case, nevertheless, does come before a court, the court, if necessary, must provide a substantive, expert, and well-reasoned ruling on the matter before it. The section below looks in greater detail at how procedural and institutional innovations involving European and national market oversight authorities might be designed.

VI. Towards Better Safeguards for Consumers

6.1 Improving *ex ante* legal protection

Both the legitimacy of decision-making by the ACM and *ex ante* legal protection would be improved by strengthening the involvement of energy consumers/prosumers in decision-making on energy regulation. The inequality that exists between the supervisory organ and citizens is one difficulty involved in administrative and judicial proceedings in the energy sector. Another is that disputes are often multi-party, involving system operators, system users, and the ACM. Regulated system operators typically possess much greater financial resources and manpower than energy consumers and are therefore more able to defend their interests in an administrative procedure within the ACM, and then thereafter with an appeal to

an administrative court. An important question is how this inequality could be compensated for. This might be achieved, for example, by improving the legal anchoring of representative organizations' involvement in the decision-making process.¹²⁶ Taking inspiration from regulatory experiences in the United Kingdom and the United States, three possible starting points could be recommended for innovations in ACM procedure. Discussed here will be, respectively, introduction of a right of initiative for representative organizations, other forms of regulation such as negotiated settlements, and establishment of so-called "customer challenge groups". These suggestions provide topics meriting further research, but they could also serve as inspiration for improving procedures within ACER.

6.2 Right of initiative

Introduction of a right of initiative for organizations representing consumers in modification of energy codes regarding conditions and tariffs for use of the energy system, would substantially strengthen the voice of these organizations in energy regulatory decisions.¹²⁷ With a right of initiative, representative organizations could counter the current procedural imbalance, in which only the system operators may submit proposals for (modifications of) the codes and the ACM makes the decision. A right of initiative was put forward in the "Stroom" discussion paper, but was not retained in the final, rejected, Stroom bill.¹²⁸ The reason for this lies in the fact that the Minister of Economic Affairs wanted to adopt the rules regarding the network codes in a policy-neutral way.¹²⁹ It was noted, however, that inclusion of a right of initiative would be reconsidered in a subsequent legislative proposal.¹³⁰ The anchoring of a right of initiative in a future bill is highly recommended for the purpose of ensuring adequate legal protection for energy consumers. Because of the energy transition, consumers are anticipated to play a more and more active role in system management, among other things, by participation in Demand Response Programmes. It is therefore important not only for the substance of regulation, but also for decision-making processes, to be adapted to these changing roles and relationships. Inclusion of a right of initiative in law and regulation would be consistent with these developments.

¹²⁶ See, in this regard, S. Lavrijssen, J. Eijkens & M. Rijkers, "The role of the highest administrative court and the protection of the interests of the energy consumers in the Netherlands", *TILEC Discussion Paper*, p. 28.

¹²⁷ Consultation report STROOM, p. 25, <https://www.internetconsultatie.nl/stroom> accessed 1 September 2016.

¹²⁸ Consultation report STROOM, p. 25, <https://www.internetconsultatie.nl/stroom>; accessed 1 September 2016.

¹²⁹ *Kamerstukken II 2014/15*, 34 199, nr. 7, p. 10.

¹³⁰ *Kamerstukken II 2014/15*, 34 199, nr. 7, pp. 10–11.

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6.3 Establishment of Customer Challenge Groups

The establishment of Customer Challenge Groups (CCGs) is another initiative to strengthen involvement of consumers/prosumers in energy regulatory decisions.¹³¹ In the United Kingdom, the Water Services Regulation Authority (OFWAT), which is the independent oversight authority for the water sector in England and Wales, has established a CCG.¹³² Its aim in doing so is to involve water consumers in a more direct fashion in setting water tariffs. Participation within the CCG makes it easier for consumers to understand how the price of drinking water is determined and tariffs are established. The goal is to create greater awareness within the public about the establishment of water tariffs. The CCG is an independent organ composed of an independent chairperson and interested parties, including household consumers, business consumers, local authorities, environmental interest groups, and other stakeholders.¹³³ The CCG can influence the business plan and drinking water tariffs of water companies. In fact, the water companies are obliged to respond to the substance of any comments and concerns raised by the CCG. The water company must also indicate how it has effectuated consumer participation in practice.¹³⁴ Greater participation of consumers may result in water tariffs being set more fairly. Greater stimulus for innovation can also be generated among the water companies.¹³⁵ OFWAT considers reports of the CCG in its review of water tariffs.¹³⁶ Following the OFWAT example, the ACM might also consider establishing a CCG, to involve consumers and other stakeholders more directly in establishment of energy regulatory decisions.

6.4 Negotiated settlements

The introduction of negotiated settlements is a third means of strengthening participation of interested parties in development of energy regulatory decisions and improving the quality of regulatory decisions.¹³⁷ Negotiated settlements involve a more cooperative form of regulation and represent a next step forward from the introduction of Customer Challenge Groups. Negotiated settlements can be defined as “a form of regulation of public utilities that is alternative or complementary to the conventional process of litigation”.¹³⁸ Implementation of negotiated settlements is closely linked to the introduction of a right of initiative, as discussed above. Hensgens et al. recently argued for implementation of a system of negotiated settlements in the Netherlands. Client groups, such as consumer organizations and energy cooperatives, would need to be given, among other things, more options and opportunities to negotiate with system operators, following the US example.¹³⁹ The ACM, as oversight authority, could play a facilitative role in this, in which it could intervene if the dialogue between stakeholders is unsuccessful. In the United States, the Federal Energy Regulatory Commission (FERC),

which is an independent federal energy authority, has jurisdiction over the regulation of inter-state oil and gas pipelines and electricity grids. The FERC has a long history of large-scale employment of negotiated settlements.¹⁴⁰ The advantage of negotiated settlements is that they generally enjoy greater support.¹⁴¹ It could be argued that they offer a higher democratic standard than regular decisions, because more parties are involved in reaching a decision. Policies established through negotiated settlements are likely to be adhered to more effectively and enthusiastically than in a situation where policies are imposed on parties, as it were, from above.¹⁴² In addition, the facilitation of a dialogue between the involved market participants is likely to produce better and more innovative outcomes,¹⁴³ because more clarity is given regarding

¹³¹ S.A.C.M. Lavrijssen & B. Vitez, “Principles of good supervision and the regulation of the Dutch drinking water sector”, *Competition and Regulation in Network Industries*, 2015, nr. 3, pp. 250–252.

¹³² See <http://www.ofwat.gov.uk/pricereview/>; accessed 1 September 2016. See Ofwat (2011), “*Involving customers in price setting: Ofwat’s customer engagement policy statement*”, which demonstrates that water companies are required to organize consumer participation.

¹³³ Ofwat 2011.

¹³⁴ Ofwat (2013), “*Setting price controls for 2015–20 – framework and approach – A consultation*”, http://www.ofwat.gov.uk/wp-content/uploads/2015/10/pap_con201301framework.pdf; accessed 1 September 2016, p. 35.

¹³⁵ See also Lavrijssen & Vitez 2015, p. 251. *Research by design: Customer challenge group process. Review of lessons learned, Consumer Council for Water Qualitative Research Report, June 2014*, <http://www.ccwater.org.uk/wp-content/uploads/2014/07/Customer-Challenge-Group-process-Review-of-lessons-learned2.pdf>; accessed 1 September 2016. Customer Challenge Group, Dwr Cymru Welsh Water, *Report on the on the Company’s Business Plan for the 2014 Price Review*, 2 December 2013, http://www.dwrcymru.com/library/pr14/CCG_Report_2_Dec_2013.pdf; accessed 1 September 2016.

¹³⁶ Article 35, fourth paragraph, of Directive 2009/72/EC.

¹³⁷ Robert Hensgens, Paul Nilesen, Stephen Littlechild & Bert Tieben, “De nieuwe netwerkregulering: macht aan de klant” [“Network regulation new style: Power to the customer”], *Me Judice*, 11 February 2016.

¹³⁸ J. Doucet & S. Littlechild, “Negotiated settlements: The development of economic and legal thinking”, *Electricity Policy Research Group Working Paper 0604*, Cambridge, University of Cambridge, 2006, p. 1.

¹³⁹ Lavrijssen, Eijkens & Rijkers 2014, p. 73.

¹⁴⁰ S. Littlechild, “The process of negotiating settlements at FERN”, *Cambridge Working Paper 1116*, pp. 13–14.

¹⁴¹ Littlechild 2011, p. 32.

¹⁴² G. Palast, J. Oppenheim & T. MacGreagor, *Democracy and regulation: How the public can govern essential services*, London and Virginia: Pluto Press, pp. 88, 96. See also: J. Doucet and S. Littlechild, “Negotiated settlements: The development of economic and legal thinking”, *Electricity Policy Research Group Working Paper 0604*, Cambridge, University of Cambridge, 2006, p. 11.

¹⁴³ Doucet & Littlechild 2006, pp. 12–13.

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mutual expectations and greater concessions are made to the needs and desires of market participants.¹⁴⁴ A final advantage that has been observed is that implementation of negotiated settlements may save time and money, ultimately leading to greater efficiency in regulation of the energy sector.¹⁴⁵

Negotiated settlements could have disadvantages as well. If a clear procedural framework is lacking, transparency can be lacking.¹⁴⁶ In addition, information asymmetry or too-large clashes of interests between the various market participants could slow procedures in practice. These disadvantages can be overcome, however, by endowing the oversight authority with final decision-making authority to resolve deadlocks.¹⁴⁷ The system of negotiated settlements should be further investigated. In light of the changing roles of the distribution system operators and energy consumers, such a form of regulation might do greater justice to the new relationships than any top-down form of regulation imposed by an energy oversight authority. Future research and experiments with new forms of regulation would increase understanding of the advantages and disadvantages of this form of negotiated regulation.

VII. The Climate Commissioner

The energy transition concerns all of us. European, national, and local governments, market participants, consumers and prosumers, and citizens all must do their part to achieve a sustainable energy supply. Safeguards for better ex ante and ex post legal protection for energy consumers in proceedings regarding regulatory decisions in the energy sector form only part of a very complex social problem involving numerous parties, laws, rules, and procedures. The energy transition is taking place within a diversity of legal domains (constitutional law, administrative law, energy law, environmental law, spatial planning law, and municipal and provincial law), political domains (European, national, and local), the State domain (with the State as the sole shareholder of TenneT and Gas Transport Services), the domain of oversight authorities (European Commission, ACER, and the ACM), and the social domain (interests of citizens, businesses, special interest groups, and consumers). At present, the various domains do not appear to be in communication and interaction with one another, but seem instead to be working along separate tracks. This introduces a danger that some interests will go unheard in the political and public debate. It is therefore recommended that an independent climate organ, transcending the different governmental departments, be established. This organ would be mandated to oversee implementation and performance on all targets, rules, and procedures relevant to the energy transition and to safeguard mutual coherence and interaction of the diverse processes

and rules. The Council for the Environment and Infrastructure has also called for an independent governmental commissioner to oversee progress towards a sustainable energy supply. That commissioner would be charged with stimulating, monitoring, and facilitating progress towards this goal in the long term (independent of cabinet changes).¹⁴⁸

In setting up the Climate Commissioner position, inspiration could be drawn from the design of the Delta Commissioner position, which was established in 2010. The Delta Commissioner formulated the Delta Programme and submitted proposals for its achievement to the governing cabinet. The Delta Programme, like the State's sustainable energy transition target, is a programme geared to and representing a long-term interest, to protect the Netherlands from flooding and ensure a sufficient supply of fresh water.¹⁴⁹ To achieve this, the Delta Commissioner has independent responsibilities, on both horizontal and vertical planes. The Commissioner must reconcile the interests of different stakeholders while at the same time monitoring political and administrative procedures concerning the Delta Programme, with no fear of not being re-elected.¹⁵⁰ The added value of such an independent commissioner lies in its ability to operate independently of the political establishment.¹⁵¹ An independent commissioner can be given objective tasks. These must be performed regardless of the political situation and whatever short-term political interests currently prevail in the Netherlands. In addition, the commissioner's independence can ensure that cohesion is maintained in oversight of the

¹⁴⁴ Hensgens, Nillesen, Littlechild & Tieben 2016.

¹⁴⁵ Doucet & Littlechild 2006, p. 14.

¹⁴⁶ Doucet & Littlechild 2006, p. 7.

¹⁴⁷ Littlechild 2011, p. 32.

¹⁴⁸ Raad voor de Leefomgeving en Infrastructuur, *Rijk zonder CO₂, Naar een duurzame energievoorziening in 2050* 2050 Counsel for the Environment, "Affluence without CO₂: Towards a Sustainable Energy Supply in 2050", September 2015, p. 8.

¹⁴⁹ See <http://www.deltacommissaris.nl/organisatie/inhoud/deltacommissaris-wim-kuijken>; accessed 1 September 2016.

¹⁵⁰ Under article 3.6(a), second paragraph, of the Delta Act on flood risk management and the supply of freshwater, the Delta Commissioner is appointed by royal order, in accordance with the feeling of the Council of Ministers. The Delta Commissioner can also be suspended and dismissed by royal order. In line with article 3.6(a), third paragraph, of the Delta Act, the Delta Commissioner is appointed for a period of seven years maximum and can be re-appointed once.

¹⁵¹ P.J.M. de Goede, *Wie dan leeft, wie dan zorgt? Klimaatverandering en het gebrek aan langetermijngerichtheid van politiek en bestuur* [Those alive then can take care of it? Climate change and the lack of a long-term orientation of the bureaucrats and the political establishment], Scientific Council for Government Policy (WRR): The Hague 2015, pp. 15–16.

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multiple facets of law, government administration, and society that the energy transition affects.¹⁵² Establishment and design of the Climate Commissioner position merits further investigation.

VIII. Conclusion

The conclusion of this contribution is that in the face of the energy transition, European and national energy legislation is in need of a fundamental review and revision. This fundamental reappraisal is necessary not only with regard to new substantive rules to regulate the new roles, rights, and obligations of the distribution system operators, transmission system operators, energy consumers, prosumers, energy companies, and other players. Adequate emphasis will also be needed for assurances of participation and legal protection for energy consumers/prosumers in procedures concerning regulation of the energy market, such as establishing conditions and setting tariffs for accessing the energy system. This contribution demonstrated that these assurances are now already under threat. Due to the increasingly active role of consumers/prosumers in the energy transition, it will become even more important in the coming years to ensure that adequate

legal safeguards are provided. This contribution sketched a few possible outlines for better protection of energy consumers and prosumers vis-a-vis the ACM. It called for stronger ex ante protection and greater involvement of consumers in establishing the conditions and setting tariffs for accessing the energy system. The importance of adequate legal protection goes beyond protection of the interests of the energy consumer/prosumer. It is also crucial to ensure the legality of decision-making by the ACM. This contribution furthermore recommended establishment of an independent climate commissioner position, to oversee implementation and coherence of all relevant legislation, decisions, processes, and procedures relating to the energy transition. The advantages and disadvantages of various proposals will require further investigation, for example, drawing on experiments and empirical analysis of decision-making processes in new (local) energy projects. In short, regulation of the energy transition will continue to produce considerable food for thought and discussion well into the coming years.

¹⁵² De Goede 2015, p. 16.